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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE COLLEGE ATHLETE NIL
LITIGATION

Case No. 4:20-cv-03919-CW

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY
SETTLEMENT APPROVAL**

Hon. Claudia Wilken
Hearing Date: September 5, 2024
Hearing Time: 2:30 p.m.
Location: Courtroom 2, 4th Floor

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INTRODUCTION

The Settlement Agreement in this case, ECF No. 449-03, is the product of intense and carefully structured negotiations with attorneys who have repeatedly been recognized as adequate class counsel in student-athlete compensation cases, and who have vigorously and often successfully pursued damages and injunctive claims on behalf of college athletes over the last decade. Going forward, the settlement allows Defendants' member institutions to provide additional benefits to student-athletes, and many of those member institutions (including within the Autonomy Conferences) have made clear that they plan to do so, with all Defendants' full support. Looking backwards, the settlement provides substantial monetary compensation for the release of compensation-related claims.

Defendants support preliminary approval of the proposed settlement, and submit this Reply to respond to the claim, made by both the Colorado Objectors (ECF No. 473) and the Crew Objectors (ECF No. 475), that the Settlement Agreement provides inadequate consideration for damages claims unrelated to NIL—*viz.*, claims for additional institutional compensation (or so-called “pay-for-play”), and claims regarding alleged lost scholarships (collectively referred to in this brief as “additional compensation claims”). The Objectors’ claim is without merit.

As an initial matter, the Settlement Agreement provides substantial consideration for the additional compensation claims. Defendants are paying the “NIL Claims Settlement Amount,” which is \$1.976 billion, and the “Additional Compensation Claims Settlement Amount,” which is \$600 million. Together, those sums resolve all damages claims that relate in any way to *both* “any and all previously existing NCAA and conference rules regarding monies and benefits that may be provided to student-athletes by the NCAA, Division I conferences and/or Division I Member Institutions,” and “NCAA or conference limitations on the numbers of scholarships allowed or permitted in any sport.”¹ Settlement Agreement at 9–10, 14 §§ A(1)(oo); C(3). As the name

¹ As set forth in more detail in concurrently-submitted filings, the Settlement Agreement does not release the claims currently raised in the complaint in *Choh v. Brown University*, No. 3:23-cv-305 (D. Conn.), or claims under federal or analogous state labor laws, including the claims currently raised in the complaint in *Johnson v. NCAA*, No. 2:19-cv-5230-JP (E.D. Pa.).

1 suggests, all released damages claims unrelated to NIL fall within the substantial “Additional
 2 Compensation Claims Settlement Amount.” While Objectors’ counsel baselessly claim there is
 3 insufficient consideration for a distinct subset of those claims relating to lost scholarships, ECF
 4 No. 473 at 10–14; ECF No. 475 at 12–13, they never filed or raised such allegedly distinct claims—
 5 nor suggested those claims have any merit whatsoever—at any point before now.

6 Objectors’ opportunistic arguments about the Additional Compensation Claims Settlement
 7 Amount also ignore the extreme amount of litigation risk attending those claims, such that there
 8 was a substantial risk of the classes recovering nothing. All such claims seek damages for
 9 additional benefits that allegedly would have been provided by the more than 350 different schools
 10 in NCAA Division I. Those schools indisputably have different budgets, different sports offerings,
 11 and different athletic and academic priorities that shift from year to year. In a but-for world without
 12 a ban on pay-for-play or scholarship limits, each of those schools undoubtedly would have made
 13 different sets of highly individualized decisions about what benefits to offer to the hundreds of
 14 different student-athletes on their campuses. And given that most Division I schools already
 15 operate their athletic departments at a loss, it is indisputable that those reallocations would have
 16 left many student-athletes worse off, including by reducing or eliminating athletic scholarships in
 17 some sports at some schools. For all these reasons, it would be impossible to develop the essential
 18 prerequisite to class certification of these claims: a working economic model capable of
 19 determining whether and which student-athletes at each of these hundreds of schools would have
 20 been injured. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*-MDL No. 1869, 725 F.3d 244,
 21 253 (D.C. Cir. 2013) (“No damages model, no predominance, no class certification.”). Objectors’
 22 counsel do not provide such a model or even describe how one could be generated.

23 Objectors’ case is even weaker with respect to lost scholarship claims. In addition to the
 24 practical difficulties described above, these claims have failed every time they have been litigated.
 25 In a directly on-point case, one court denied class certification of a football-only lost scholarship
 26 class, which was considerably less sprawling than the classes pleaded here. *See, e.g., In re NCAA*

27 *See* Joint Decl. of Steve W. Berman and Jeffrey L. Kessler in Further Support of Plaintiffs’ Mot.
 28 for Preliminary Settlement Approval, ¶¶ 17–18.

1 *I-A Walk-On Football Players Litig.*, 2006 WL 1207915 at *7–8 (W.D. Wash May 3, 2006). Other
 2 scholarship claims have failed at other stages, *see Rock v. Nat'l Collegiate Athletic Ass'n*, 2016
 3 WL 1270087, at *7–9, *14 (S.D. Ind. Mar. 31, 2016) (class certification); *Agnew v. Nat'l*
 4 *Collegiate Athletic Association*, 2011 WL 3878200, at *10 (S.D. Ind. Sep. 1, 2011) (motion to
 5 dismiss), *aff'd*, 683 F.3d 328 (7th Cir. 2012). Based on this unbroken line of precedent, there is no
 6 reason to think that lost scholarship claims have any economic value. And the risks on the merits
 7 and on appeal make the additional compensation claims all the more speculative.

8 Finally, the settlement should be approved even accepting the Colorado Objectors'
 9 alternative projection of \$24.3 billion in damages for the additional compensation claims. Even
 10 under that extremely implausible scenario, the settlement amount would represent 2.5% of single
 11 damages, which is well within the range of settlements that have previously been approved—
 12 especially given the early stage of the case and the litigation risks involved.

13 The Court should enter the proposed Preliminary Approval Order.

14 **I. THE ADDITIONAL COMPENSATION CLAIMS SETTLEMENT IS ADEQUATE
 15 AND SHOULD BE APPROVED.**

16 The Settlement Agreement provides that Defendants will pay \$600 million over a ten-year
 17 period in “full, complete, and final settlement of any and all additional claims for damages” in the
 18 amended complaint in this case, beyond “claims for NIL-related damages.” Settlement Agreement
 19 at 14, § C(3). The Second Amended Complaint (“Complaint”), in turn, pleads damages claims
 20 related not just to NIL and pay-for-play, but also to NCAA rules that “fix the amount that student-
 21 athletes may be paid for their athletic services at no more than the value of a scholarship; and []
 22 limit the quantity of athletic scholarships available in the market for student-athletes’ labor
 23 services.” Complaint ¶ 7; *see id.* ¶¶ 96, 98, 110, 317–18. The \$600 million payment thus plainly
 24 covers both claims for additional institutional compensation and lost scholarship claims. And
 25 notably, this treatment is consistent with how the *Fontenot* Complaint characterizes scholarships
 26 as just one piece of “[t]he amount of money paid to Plaintiffs and class members” to which they
 27 are allegedly entitled. *Fontenot* Second Am. Compl. ¶ 86; *see also id.* ¶ 97 (alleging that
 28 “Defendants have long allowed athletes to be paid in the form of scholarships in return for their

1 labor”).

2 The question before the Court is therefore simple: Is \$600 million “fair, reasonable, and
3 adequate” consideration for the release of these claims? The answer is indisputably yes.

4 **A. The Additional Compensation Claims Involved Substantial Litigation Risks.**

5 It is important to inject a dose of reality. The additional compensation claims are sprawling
6 in nature, covering hundreds of thousands of student-athletes in a variety of different sports at over
7 350 member institutions in Division I. In the 2022-23 academic year alone, the more than 350
8 Division I member institutions organized athletics competition for over 188,000 student-athletes.

9 *See, e.g.*, ECF No. 415-6, Dec. 2023 Expert Report of Gautam Gowrisankaran (“Gowrisankaran
10 Rpt.”) ¶ 15. Under current NCAA rules, each of these institutions can provide significant benefits
11 to student-athletes, including any combination of: (i) full cost-of-attendance athletic scholarships
12 that offset hundreds of thousands of dollars of educational costs and thus provide a pathway to
13 higher education for many student-athletes; (ii) additional payments from NCAA funds like the
14 Student Assistance Fund and the Student-Athlete Opportunity Fund to cover various other
15 expenses; (iii) preferential admissions treatment and class scheduling; (iv) educational support; (v)
16 medical insurance; (vi) meals; (vii) coverage of medical expenses; (viii) top-flight athletic training;
17 and (ix) access to best-in-class facilities. *See, e.g.*, ECF No. 415-9, Jan. 2024 Expert Report of
18 Ashley Langer (“Langer Rpt.”) ¶¶ 26–41.

19 These benefits are often provided to student-athletes regardless of the general profitability
20 of the sport they play, their individual playing time (if they play at all), or the popularity of the
21 individual student-athlete or their sport. It is undisputed that at most schools, football is the only
22 program that generates positive net revenue, meaning that virtually all other sports cost more
23 money for the schools to offer than they can generate for the institution. *See, e.g.*, Gowrisankaran
24 Rpt. ¶ 18. Yet schools nevertheless provide scholarships and benefits in many other sports. *See,* e.g.,
25 Langer Rpt. ¶¶ 42–49. For example, a Division I institution may provide full cost-of-
26 attendance scholarships to a star quarterback on the football team (which may generate positive
27 revenue from media rights), a backup shooting guard who barely plays on the basketball team
28

1 (which may generate slightly positive revenue overall), and a men’s lacrosse player and a women’s
 2 field hockey player (two sports that do not generate positive net revenue at any Division I
 3 institution). Indeed, expert analysis in this case revealed that 97% of Division I sports programs
 4 *already* have expenses that exceed their revenues when excluding university subsidies. *See, e.g.*,
 5 Gowrisankaran Rpt. ¶¶ 18, 71.

6 Schools vary dramatically, however, in the level of individual benefits that they choose to
 7 provide each of their student-athletes. NCAA member institutions and their athletic programs vary
 8 in their economic resources and potential to generate revenue due to the size of their fan bases,
 9 histories of athletic performance, and myriad other factors. Langer Rpt. ¶¶ 57–58. Universities
 10 with greater athletic department revenues tend to expend more per student-athlete. Gowrisankaran
 11 Rpt. ¶¶ 70, 77–80, 119, 122. So there is huge variance across the putative classes, which span
 12 hundreds of institutions that offer different numbers of sports and different numbers and amounts
 13 of scholarships to hundreds of thousands of individual student-athletes. One recent and clear
 14 example of this significant variance is how each of the hundreds of Division I schools responded
 15 individually to this Court’s injunction in *Alston* with respect to their approaches in offering
 16 individual student-athletes *Alston* awards. As Defendants recently explained, policies guiding
 17 implementation of *Alston* awards vary dramatically from school to school, student to student, and
 18 year to year, illustrating the different priorities and budgets of Division I member institutions. *See*
 19 *Hubbard v. NCAA*, Case No. 4:23-CV-01593-CW, ECF No. 164, Def. Joint Opp’n to Pls. Mot. for
 20 Class Cert. (May 16, 2024) at 6–10 (school to school), 12 (student to student), 18 (year to year).

21 These indisputable facts underscore why the putative classes faced a substantial set of
 22 hurdles in pursuing the additional compensation claims. Litigating any of those claims on a class-
 23 wide basis would require plaintiffs to produce a working economic model capable of establishing
 24 injury for all class members without resorting to individualized proof. *See Amgen, Inc. v. Conn.*
 25 *Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013); *see Ward v. Apple Inc.*, 2018 WL 934544, at
 26 *3 (N.D. Cal. 2018), *aff’d*, 784 F. App’x 539, 540 (9th Cir. 2019) (experts’ “failure to provide
 27 ‘properly analyzed, reliable evidence that a common method of proof exists to prove impact on a

1 class-wide basis’ is fatal” (simplified)); *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555,
 2 570 (N.D. Cal. 2013); *see also In re Asacol Antitrust Litig.*, 907 F.3d 42, 54–55 (1st Cir. 2018). A
 3 valid economic model must be presented so that the court can then discharge its duty under Rule
 4 23, which “not only authorizes a hard look at the soundness of statistical models that purport to
 5 show predominance,” but “commands it.” *Rail Freight*, 725 F.3d at 253, 255.

6 Nor is it sufficient to generate a model that simply spits out a positive number for each
 7 class member. *West v. Prudential Sec. Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *accord Am. Honda*
 8 *Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010); *In re Hydrogen Peroxide*, 552 F.3d 305,
 9 323 (3d Cir. 2008). The model must be a *working* model—it must involve a but-for world grounded
 10 in economic rationality. *See Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506,
 11 1511 (9th Cir. 1985) (“[Plaintiff] must presume the existence of rational economic behavior in the
 12 hypothetical free market.”). If the model does not survive the rigorous scrutiny required by Rule
 13 23—or the independent requirements of Rule 702—then certification is improper.

14 Plaintiffs would face insurmountable hurdles in trying to generate the requisite models.

15 Substantial class certification risk for pay-for-play claims. First, any model for additional
 16 institutional compensation claims would start out individualized and fractionalized because it
 17 would have to account for the substantial differences between hundreds of Division I schools. As
 18 noted above, Division I schools have vastly different budgets and priorities; some schools provide
 19 limited scholarships in the bare minimum number of sports required to maintain Division I
 20 membership, whereas others provide full scholarships, *Alston* payments, and other benefits in far
 21 more sports. Any class-wide impact and damages model would somehow have to factor in the
 22 unique circumstances of each Division I school in order to determine what, if any additional
 23 payments—beyond the value of the benefits that certain schools already offer individual student-
 24 athletes—might be offered, and would represent “rational economic behavior” absent the
 25 limitations on pay-for-play. *Dolphin Tours*, 773 F.3d at 1511.

26 These school-level strategy decisions, which would vary school-by-school and sport-by-
 27 sport, would surely result in some student-athletes being worse off, or at least no better off, in the
 28

1 but-for world. Lesser-resourced schools might cut certain sports in order to free up additional
 2 money to spend on student-athletes in sports where they are more competitive or that generate
 3 more alumni support or fan interest. As one example, a school might decide to cut men's lacrosse—
 4 creating many uninjured (in fact, worse-off) class members—to provide more funding for
 5 women's gymnastics because of recent Olympic success by student-athletes. These type of trade-
 6 offs would also create class conflicts that are fatal to class certification. As described in more
 7 detail below, that type of conflict is exactly what doomed scholarship claims in *In re Walk-On*
 8 *Football Player Litigation*, 2006 WL 1207915 at *7–8. The same would be true of pay-for-play
 9 claims, as any but-for world would have to account for the different ways in which schools would
 10 shift their resources, resulting in both “winners” and “losers” within the putative class.

11 Second, these changes could not be assessed just at a school level. Determining which class
 12 members are injured would require consideration of the facts and circumstances of each individual
 13 putative class member. These athletes play different positions in different sports at different levels
 14 at hundreds of different Division I schools, and would correspondingly have inherently different,
 15 potentially conflicting, and individualized claims for impact and damages. If it was economically
 16 rational for a particular school to pay more money to the star quarterback on the football team, but
 17 no more to any other player, that would mean that every other player on the football team would
 18 be no worse off and thus an uninjured class member. If a school decided to provide fewer
 19 scholarships in baseball to free up more money to spend on basketball, then some of the baseball
 20 players might be uninjured or worse-off class members, with interests in conflict with those of
 21 other class members. Making things more complicated, baseball is an equivalency sport, meaning
 22 that cutting the cost equivalent of one scholarship might mean that three or four student-athletes
 23 lose all the scholarship aid they were receiving. ECF No. 251-01, Apr. 2023 Expert Report of
 24 Catherine Tucker (“Tucker Rpt.”) ¶¶ 117–19 (equivalency scholarships can be divided between
 25 different players in different amounts). Properly modeling the but-for world would require a proper
 26 assessment of the individual welfare and circumstances of each student-athlete.

27 Third, all of this would be further complicated by the fact that these additional payments
 28

1 would be made in a hypothetical world where schools were already providing substantial benefits
 2 to student-athletes in the form of scholarships, *Alston* Awards and/or other benefits, as well as
 3 possible *additional* compensation to student-athletes for NIL. *See Concord Boat Corp. v.*
 4 *Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) (model must “incorporate all aspects of the
 5 economic reality” of the market); *Ohio v. Am. Express Co.*, 585 U.S. 529, 547–48 (2018) (analysis
 6 must consider outcomes “one would expect to find in a competitive market”). Assessing whether
 7 any school would have provided *even more* additional compensation beyond the significant sums
 8 Plaintiffs alleged in retrospective NIL damages would make for an even more complicated task,
 9 and likely an even more implausible and indefensible model.

10 Nor could Plaintiffs avoid these intractable difficulties by shorthand. Under the law, it
 11 would be insufficient to simply assert that schools would find more money without offering some
 12 explanation of how they would do so. *In re: NFL “Sunday Ticket” Antitrust Litig.*, No. 15-ML-
 13 2668 (PSG), 2024 WL 3628118, at *5 (C.D. Cal. Aug. 1, 2024) (merely asserting that things would
 14 work out in the but-for world is not a valid economic analysis under *Daubert*); *see also Gen. Elec.*
 15 *Co. v. Joiner*, 522 U.S. 136, 146 (1997) (expert cannot rely on *ipse dixit*); *Domingo ex rel.*
 16 *Domingo v. T.K.*, 289 F.3d 600, 607 (9th Cir. 2002) (same). And the record indisputably shows
 17 that the vast majority of Division I schools already make costly and broad-based investments to
 18 the benefit of significant groups of student-athletes in non-revenue generating sports (*see* Langer
 19 Rpt. ¶ 39), so Plaintiffs would unlikely be able to make any legitimate showing.

20 The simplifying assumptions that the *House* Plaintiffs used in their BNIL model would not
 21 work either. There, Plaintiffs asserted that all scholarship football or basketball student-athletes in
 22 a particular Autonomy 5 conference would receive the same amount of money because a broadcast
 23 would require the use of all of their NILs. Setting aside Defendants’ objection to the very concept
 24 of BNIL and to the use of that assumption in the *House* case, the assumption would make zero
 25 sense in a case seeking additional compensation for labor in a sports labor market, where there is
 26 “one wage per *unit of talent* where the market labor demand curve crossed the market labor supply
 27 curve.” Daniel A. Rascher, *A Model of a Professional Sports League*, International Advances in
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1 the Economic Research 14 (1997); *see* Tucker Report ¶¶ 97–98.

2 And even if, against all logic, Objectors could somehow generate a model of the
 3 compensation that some of the hundreds of thousands of student-athletes would allegedly have
 4 received over a multiple-year period at hundreds of schools, that would not end the inquiry.
 5 Defendants indisputably have the right to advance individualized defenses to each class member's
 6 claim, making a class action even less tenable. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367
 7 (2011); *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016).

8 Substantial class certification risk for scholarship claims. Even more profound problems
 9 would plague any efforts to certify classes relating to lost scholarship amounts. Plaintiffs pursuing
 10 such a claim would have to show that in the but-for world, they would have received the additional
 11 scholarships that a school decided to provide. But figuring out what additional scholarships, if any,
 12 an individual school would have provided across its particular set of sports offerings would involve
 13 the exact same type of speculative, particularized analysis described above.

14 Even if that hurdle could be cleared, problems would persist, because claims for additional
 15 scholarships defy certification and have been uniformly rejected by the courts. Objectors do not
 16 distinguish—or stunningly, even mention—*In re NCAA I-A Walk-On Football Player Litigation*,
 17 a directly-on-point precedent that explains why these claims would fail. *See* 2006 WL 1207915, at
 18 *15 (W.D. Wash. May 3, 2006). As here, the plaintiffs in *Walk-On* alleged that scholarship limits
 19 are a “cost-containment practice” that injured them by denying them full or partial scholarships,
 20 and sought to pursue damages claims on a class basis. *Id.* at *1. The case involved claims by only
 21 football players, which itself represents a dramatic simplification of the claims alleged here. In
 22 fact, the putative class in *Walk-On* was further limited to a subset of walk-on players that had an
 23 arguably more realistic claim to have received scholarship aid. *Id.* at *2.

24 Even in that more limited context, the court denied certification. The court first concluded
 25 that the plaintiffs could not establish adequacy because the interests of class members were
 26 fundamentally antagonistic: “If, for example, the players can prove that each school would have
 27 awarded 20 additional scholarships, they then will have to prove *who* would have received those

1 scholarships — and for each to prove that *he* would have been in that group, he will have to prove
 2 that others were not.” *Id.* at *9 (emphases in original). The court further found that the putative
 3 class could not establish predominance, for reasons similar to those described above: “Antitrust
 4 injury *as to each member of the class* (proof of which is required) cannot be proven without
 5 considering the facts surrounding each class member, including whether each one of them would
 6 have actually been awarded one of the additional scholarships and which school he would have
 7 attended. Fully proving antitrust injury requires providing answers to highly individualized
 8 questions such as these.” *Id.* at *12 (internal citation omitted) (emphasis in original).

9 Notably, the *Walk-On* decision preceded the Supreme Court’s clarifications that the Rule
 10 23 analysis requires considerable rigor. *See Wal-Mart*, 564 U.S. at 350–51; *Comcast v. Behrend*,
 11 569 U.S. 27, 33 (2013); *Tyson*, 577 U.S. at 459. And *Walk-On* is not the only decision rejecting
 12 scholarship claims. *See Rock*, 2016 WL 1270087, at *10–17 (rejecting class certification of
 13 scholarship-related claims for damages and injunctive relief on several overlapping grounds,
 14 including adequacy and predominance); *Agnew*, 2011 WL 3878200, at *8–9 (rejecting such claims
 15 at motion to dismiss phase), *aff’d*, 683 F.3d 328. Objectors provide no explanation for how they
 16 could avoid the clear obstacles to certification identified in these opinions, which indicate that the
 17 claims would be doomed from the start and thus lack economic value.

18 Substantial risk on the merits for both sets of claims. Setting aside the class certification
 19 risks, the Objectors ignore the substantial risk they would face on the merits. Even beyond the
 20 likelihood of the Court rejecting their implausible models, many courts have declined to call into
 21 question the validity of the fundamental prohibition on pay-for-play implicated by the additional
 22 compensation claims. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust*
 23 *Litig.*, 375 F. Supp. 3d 1058, 1103–04 (N.D. Cal. 2019) (“The procompetitive effect of these caps
 24 is preventing unlimited, professional-level cash payments, unrelated to education, that could blur
 25 the distinction between college sports and professional sports.”), *aff’d*, 958 F.3d 1239, 1264 (9th
 26 Cir. 2020) (“[L]imits on cash compensation unrelated to education do not . . . constitute
 27 anticompetitive conduct and, thus, may not be enjoined.” (emphasis in original)); *O'Bannon v.*
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1 *Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076–77 (9th Cir. 2015) (“[T]he market for college
 2 football is distinct from other sports markets and must be differentiated from professional sports
 3 lest it become minor league football” (cleaned up)). And while both sets of Objectors cite one
 4 Justice’s view in the Supreme Court’s *Alston* decision, they ignore that *the Court’s* opinion
 5 similarly did not question the basic prohibition on pay-for-play. *See, e.g., Nat'l Collegiate Athletic
 6 Association v. Alston*, 141 S. Ct. 2141, 2164–66 (2021) (noting that relief sought by plaintiffs in
 7 that case, and ordered by this Court, did not undercut rules prohibiting compensation untethered
 8 to education). A court confronted with pay-for-play claims could find this judicial history
 9 compelling in upholding the ban on pay-for-play, particularly given that lifting the ban could result
 10 in realignment of sport, scholarship, and aid decisions at individual institutions that could leave
 11 many student-athletes in non-revenue-generating sports worse off. *See infra* at 6–7.

12 A jury could reach the same decision, choosing to reject either the Objectors’ model or
 13 their proof, and leaving the entire class with nothing. *See, e.g., In re HIV Antitrust Litig.*, 2022 WL
 14 19575576, *1 (N.D. Cal. Oct. 12, 2022) (jury verdict in favor of defendants in antitrust class action
 15 litigation by end purchasers involving pay-for-delay claims regarding drugs used to treat the
 16 Human Immunodeficiency Virus (“HIV”)); Jury Verdict, *In re Korean Ramen Antitrust Litig.*, No.
 17 13-CV-4115, ECF No. 920 (N.D. Cal. Dec. 17, 2018) (jury verdict for defendants in antitrust class
 18 action where plaintiffs sought approximately \$246 million in single damages for antitrust claims
 19 alleging defendants engaged in a conspiracy to fix the price of ramen noodle products).

20 Substantial appellate risk for both sets of claims. Last, all of the foregoing risks would be
 21 multiplied by the inevitability of appeals. Defendants would have the right to seek interlocutory
 22 review of any order granting class certification, which would surely stretch established Rule 23
 23 law beyond any acceptable boundaries. Moreover, Defendants could appeal any adverse merits
 24 decisions to both the Ninth Circuit and the Supreme Court. Those appeals could completely
 25 extinguish the class members’ claims (i.e., a recovery of \$0 and an obligation to pay Defendants’
 26 costs), or at least delay any recovery for years.

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B. The Settlement Is Reasonable Even Accepting The Objectors' Damages Calculations.

With all those risks in mind, \$600 million represents more than an adequate recovery for the additional compensation claims. And that is so even accepting the Colorado Objectors' implausible damages calculations of \$24.3 billion. The settlement amount would represent a recovery of 2.5% of that asserted amount, which is well within ranges approved by courts in other cases, even at later stages. *See, e.g., In re New Jersey Tax Sales Certificates Antitrust Litig.*, 2016 WL 7494259, at *1–2 (D.N.J. Sept. 30, 2016), aff'd, 750 F. App'x 73 (3d Cir. 2018) (settlement for 2% of claimed damages after partial denial of motion to dismiss); Final Judgment & Order Granting Final Approval of Class Settlement, *In re Dental Supplies Antitrust Litig.*, 16-CV-696 (BMC), ECF No. 341 (E.D.N.Y. June 25, 2019) (settlement for 3% of high-end damages claim after discovery was complete); *In re Cathode Ray Tube (Crt) Antitrust Litig.*, 2015 WL 9266493, at *5 (N.D. Cal. Dec. 17, 2015) (\$9.75 million antitrust class action settlement following summary judgment briefing, where plaintiffs' maximum recovery "could exceed two billion dollars," and settlement thus represented 0.49% of maximum possible recovery); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *11 (E.D. Mich. Dec. 13, 2011) (settlement, prior to resolution of class certification motion, between direct purchaser plaintiff and one defendant for "approximately 2.2% of Arctic Glacier's United States sales of Packaged Ice during the proposed Settlement Class Period"); *In re Endosurgical Prod. Direct Purchaser Antitrust Litig.*, 2008 WL 11504857, at *6 (C.D. Cal. Dec. 31, 2008) (settlement for 1.7% of relevant sales); *Meijer, Inc. v. 3M*, 2006 WL 2382718, at *2, *16 (E.D. Pa. Aug. 14, 2006) (settlement, prior to resolution of class certification motion, for approximately 2% of class member sales to defendant).

In short, a fractional recovery is no bar to approval. *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982) (“It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not perse render the settlement inadequate or unfair.” (internal citation omitted)). That is particularly so here in light of the significant litigation risks and the fact that the recovery was obtained so early in the case without the need for costly and time-consuming litigation. And of course, if the Court

1 were to instead consider the estimates proffered by Class Counsel's expert, the case for approval
 2 is still stronger.

3 **II. THE COURT SHOULD ENTER THE PRELIMINARY APPROVAL ORDER AS
 4 DRAFTED.**

5 The Court should also disregard the Colorado Objectors' challenge to the provision of the
 6 preliminary approval order temporarily staying overlapping actions pursuing identical claims. This
 7 Court's preliminary approval order in *Alston* contained an identical provision. *See* Am. Order
 8 Granting Pls.' Unopposed Mot. For Prelim. Approval of Class Action Settlement, ¶ 22 (Mar. 29,
 9 2017, ECF No. 615). It is appropriate here as well.

10 A district court has the "authority and discretion to protect the interests and rights of class
 11 members and to ensure its control over the integrity of the settlement approval process." *Hanlon*
 12 *v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). Stays of duplicative actions are proper
 13 when there is a "threat to the federal court's ability to manage and resolve the actions" including
 14 the risk that duplicative litigation would impair the court's "flexibility and authority" to approve
 15 settlements. *See In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770
 16 F.2d 328, 337–38 (2d Cir. 1985); *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 697–98 (D. Colo. 2006)
 17 (enjoining class members' claims covered by the release in the preliminarily approved settlement
 18 on the ground that "it would aid in the protection of its jurisdiction and in the management of the
 19 settlement approval process").

20 The Court should exercise that authority here. The Colorado Objectors are taking every
 21 step they can to impair the settlement process, including by filing a case pursuing claims released
 22 in the settlement only *after* the parties moved for preliminary approval. Temporarily staying
 23 pursuit of claims that are released in this settlement could aid in the protection of this Court's
 24 jurisdiction and in the management of the settlement approval process. *See Lucas*, 234 F.R.D. at
 25 697–98. And it will not unduly prejudice anyone. The Colorado Objectors have made their voices
 26 heard here and will presumably continue to do so. They can also choose to opt out of the settlement
 27 at the appropriate time and pursue their damages claims individually in their chosen forum. But
 28 allowing them to maintain and aggressively litigate a separate putative class action completely

1 subsumed within this one, at the same time the approval process unfolds in this Court, does not
2 serve anyone except the attorneys in that case.

3 **CONCLUSION**

4 The Court should preliminarily approve the Settlement Agreement.

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1 Dated: August 16, 2024

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SIGNATURE CERTIFICATION

I, Rakesh N. Kilaru, am the CM/ECF user whose ID and password are being used to file this Defendants' Reply In Support of Motion for Preliminary Settlement Approval. In compliance with Local Rule 5-1(i)(3), I hereby attest that concurrence in the filing of this document has been obtained from each of the other signatories.

Dated: August 16, 2024

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